

ORIGINAL



0000046317

RECEIVED

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARK SPITZER
COMMISSIONER

DOCKETED

AUG 03 2001

AZ CORP COMMISSION
DOCUMENT CONTROL

DOCKETED BY

IN THE MATTER OF THE APPLICATION OF) DOCKET NO. W-01656A-98-0577
SUN CITY WATER COMPANY AND SUN CITY) DOCKET NO. SW-02334A-98-0577
WEST UTILITIES COMPANY FOR APPROVAL)
OF CENTRAL ARIZONA PROJECT WATER) SUN CITY TAXPAYERS
UTILIZATION PLAN AND FOR AN) ASSOCIATION'S RESPONSE
ACCOUNTING ORDER AUTHORIZING A) TO SUN CITY WATER
GROUNDWATER SAVINGS FEE AND) COMPANY'S AND SUN CITY
RECOVERY OF DEFERRED CENTRAL) WEST UTILITIES COMPANY'S
ARIZONA PROJECT EXPENSES.) MOTION TO STRIKE

The Sun City Taxpayers Association ("SCTA") hereby responds and opposes Sun City Water Company and Sun City West Utilities Company's ("Citizens") Motion to Strike (i) portions of Dennis Hustead's Direct Testimony; and (ii) the Supplemental Testimony of Marylee Diaz Cortez for the reasons more fully set forth below.

I. THE COLLATERAL ESTOPPEL DOCTRINE IS INAPPLICABLE.

Citizens' Motion to Strike ("Motion") continues Citizens' tactic of selectively citing prior Commission decisions in an effort to shield itself from a full evaluation of the imprudent and excessively costly golf course plan being forced upon the ratepayers of Sun City Water Company. Citizens contends the testimony offered by SCTA and by the Residential Utilities Consumers' Office ("RUCO") is barred by collateral estoppel. However, in order for the doctrine to apply, all the following elements must be satisfied: the issue was actually litigated in a *previous* proceeding,

LAW OFFICES

MARTINEZ & CURTIS, P.C.
2712 NORTH 7TH STREET
PHOENIX, AZ 85006-1090
(602) 248-0372

1 there was a full and fair opportunity to litigate the issue, resolution of issue was
2 essential to the decision, there was a valid and *final* decision on the merits, and there
3 is common identity of parties. *See, Irby Const. Co. v. Arizona Dept. of Revenue*, 184
4 Ariz. 105, 907 P.2d 74 (App. 1995). The doctrine has no application in this case.

5 First, Decision No. 62293 was not a *previous* proceeding, it was an
6 earlier phase of the same proceeding (same caption; same docket numbers). To the
7 extent any decision has been rendered on the GSP, it remains interlocutory in nature
8 and subject to modification. *See, Love v. Farmers Ins. Group*, 121 Ariz. 7, 588 P.2d
9 365 (1978) (a court does not lack the power to change a ruling simply because it ruled
10 on the question at an earlier stage); *Title Ins. Co. of Minn. v. Acumen Trading Co.*,
11 121 Ariz. 525, 591 P.2d 1302 (1979) (a judgment that decides less than all the parties'
12 claims for relief remains open and is subject to revision).

13 Second, Decision No. 62293 did not *finally* resolve the issue of whether
14 Citizens should be authorized to proceed with its so-called Groundwater Savings
15 Project (i.e., a pipeline and associated facilities used to transport a portion of Citizens'
16 CAP allocation to golf courses coupled with a water exchange agreement permitting
17 Citizens to account for water it is pumping from the aquifer as CAP water). Decision
18 No. 62293 neither finally approved nor rejected Citizens proposal.¹ To the contrary,
19 Citizens was ordered to file the results of its preliminary design/updated cost estimate
20 within six months and to include, without limitation: a) the feasibility of a joint
21 facility with the Agua Fria Division including the timeframe for any such joint
22
23

24 ¹ Decision No. 62293 explained Citizens was requesting approval of "the general concept of the
25 construction of a pipeline to the golf course" before it could justify expending additional sums on
26 the project. *Id.*, p. 15. This monetary concern of Citizens was addressed by authorizing the
expenditure of funds on the Preliminary Engineering Study.

1 facility; b) the need for all major elements of its proposed plan; and c) binding
2 commitments from golf courses, public and private, and the terms and conditions
3 related thereto. Thereafter, the Hearing Division was to either conduct additional
4 hearings or file a recommended Opinion and Order for the Commission's
5 Consideration. On May 11, 2001, the Commission refused to adopt the
6 Recommended Opinion and Order filed by the Hearing Division and directed
7 additional hearings be conducted.² No final decision has been reached. Rather, an
8 interlocutory decision, approving only the "concept" of the GSP and authorizing
9 recharge at MWD has been entered, pending a final determination.
10

11 Furthermore, Citizens' argument completely ignores the existence of
12 A.R.S. § 40-252. This statute expressly authorizes the Commission to revisit and
13 rescind, alter or amend any order or decision it has made, so long as the corporation
14 affected is provided notice and an opportunity to be heard. Therefore, even if
15 Decision No. 62293 had constituted a final decision on Citizens' groundwater savings
16 project (which it clearly did not), the issue could be rescinded, altered or amended at
17 any time. The Motion to Strike is just another effort by Citizens to avoid a full and
18 fair examination of the proposed GSP premised on the supposed "finality" of
19 Decision No. 62293 and the application of the collateral estoppel doctrine. These
20 arguments provide no basis to strike SCTA's testimony.
21

22 ² Citizens appears to be arguing that SCTA should have appealed Decision No. 62293. But even the
23 case cited by Citizens, *Kunkle Transfer & Storage Co. v. Superior Court In and For Maricopa*
24 *County*, 22 Ariz. App. 315, 526 P. 1270 (1974) holds the courts have no jurisdiction where the
25 Commission has not made a final determination. An appeal of Decision No. 62293 on the GSP
26 issue would have been premature.

1 **II. MR. HUSTEAD'S TESTIMONY IS RESPONSIVE TO THE**
2 **PROCEDURAL ORDER AND DECISION NO. 62293; IS RELEVANT**
3 **AND SHOULD NOT BE STRICKEN.**

4 The June 3, 2001 Procedural Order required "SCTA, and any other
5 party who has issues with or opposes the approval of the Preliminary Engineering
6 Report . . . [to] reduce their issues/comments to writing and file direct testimony"
7 Despite this broad directive, Citizens objects to much of Mr. Hustead's testimony.
8 These objections are without merit, as in all cases the discussion is tied to the
9 Preliminary Engineering Report ("PER").

10 A. References to the aquifer, recharge or hydrology studies in Section
11 II, a portion of Section III and Section VI are appropriate. As Mr. Hustead explains
12 (*see*, pp. 3-4 and 11), one cannot properly evaluate any engineering study, including
13 the PER, without considering the purpose of the project. These portions of Mr.
14 Hustead testimony set forth his understanding that this project, unlike the typical golf
15 course pipeline, has a goal of maximizing the benefits to the underlying aquifer, while
16 minimizing costs. *See*, e.g., Decision No. 62293, p. 12 ("The use of CAP water on the
17 golf courses would directly benefit the aquifer beneath the Communities of
18 Youngtown, Sun City and Sun City West."). Therefore, he determined the PER to be
19 incomplete and otherwise deficient due to the absence of any evaluation of the
20 impacts of the various alternatives on the aquifer (which would require a hydrologic
21 analysis of the various alternatives). This testimony is directly related to the PER and
22 is appropriate.
23
24
25
26

1 While Citizens claims Section II should be stricken "because that
2 testimony does not speak to the limited issues surrounding the PER", it then admits
3 that this portion of Mr. Hustead's testimony is "critical of the PER." Motion, p. 5. In
4 the last proceeding, Citizens relied heavily on the CAP Task Force to justify pursuing
5 a golf course pipeline. As stated by Mr. Jones at Open Meeting on May 11, 2001, the
6 CAP Task Force process opened Citizens' eyes to the importance of receiving a direct
7 benefit from any proposal pursued by Citizens. The relative cost of the alternatives
8 was ranked the second most important factor. Mr. Hustead's testimony, on the need
9 to evaluate the impact of the alternatives on the aquifer, emphasizes the PER's failure
10 to address this area of concern to the CAP Task Force. Despite the importance of this
11 issue, Citizens has continuously refused to present evidence of the actual benefits
12 obtained through its proposal. The Commission and Citizens' ratepayers are entitled
13 to a demonstration of the benefits provided by this project before such a massive cost
14 (now estimated to be over \$95,000,000 over the 40 year life of the project) is imposed
15 on the ratepayers. The criticism of the PER for its failure to include an analysis of the
16 costs as they relate to the benefits to the aquifer is directly related to the PER and is
17 appropriate testimony. The fact that Citizens does not agree with Mr. Hustead does
18 not make his testimony irrelevant or improper.
19

20 Nor is the need to evaluate each alternative's impact on the aquifer
21 eliminated by a general finding that the GSP will provide direct benefits to the Sun
22 Cities. Motion, pp. 5 and 6. To the contrary, this finding supports Mr. Hustead's
23 conclusion that an evaluation of the amount of direct benefit to the aquifer is a
24
25
26

1 necessary element in determining whether there is a "need for all major elements of
2 [Citizens'] proposed plan." Decision No. 62293, p. 16.

3 Citizens also objects to Mr. Hustead's reference to recharge (Motion,
4 pp. 5-6) as if it is some evil concept that must be eliminated from the English
5 language. In these portions of his testimony, Mr. Hustead points out: 1) the PER
6 should have considered inclusion of recharge as a component of the GSP because it
7 provides operational flexibility at a reasonable cost; 2) the PER should have included
8 the cost and hydrologic impacts of recharge as a base case against which all other
9 options are to be compared; and 3) the factual circumstances have changed since the
10 recharge option was last considered as a primary option to the GSP. Again, this
11 testimony is directly related to whether the PER is complete, accurate and germane to
12 this proceeding.
13

14 B. It is entirely appropriate to provide testimony of factors that question
15 objectivity of the potential participants under the Citizens' proposal. Citizens moves
16 to strike Section VII of Mr. Hustead's testimony arguing it is nothing more than
17 personal and subjective opinions about the GSP concept. Motion, p. 7. In reality, this
18 Section of Mr. Hustead's testimony discusses how benefits to Citizens and the golf
19 courses from the project (unrelated to any benefit to the aquifer) are impacting
20 decisions that have increased the cost of the GSP; costs that Citizens ratepayers will
21 ultimately be asked to pay. It is important for the Administrative Law Judge and the
22 Commission to take these personal benefits into account when, for example,
23 evaluating whether the Rec Centers' refusal to allow private golf courses to
24 participate in the project and the Rec Centers' refusal to consider utilizing the existing
25
26

1 effluent in certain ways have unreasonably impacted the PER and the cost of the
2 proposed project.

3 C. Section VIII suggests an alternative that was not available in
4 1997 or 1999 and should have been considered in the PER. This portion of Mr.
5 Husted's testimony discusses how CAP water could be delivered to the golf courses
6 in Sun City West by integrating those deliveries with the reclaimed water generated
7 by the Citizens' sewer treatment plant and its Underground Storage Facility (USF).
8 From the information available to Mr. Husted, it appears that between the demands
9 of the Sun City West golf courses and the capacity of the existing USF, all or almost
10 all of the CAP water could be delivered without the need to construct any of the Sun
11 City distribution system.
12

13 Citizens argues this alternative was not part of its proposed GSP and
14 therefore was not required to be included in the PER. Motion, p. 7. This argument
15 only serves to demonstrate Citizens' improper narrowing of the focus of the PER.
16 Why is Citizens afraid to discuss and fully evaluate "any" method that brings CAP
17 water to the Sun Cities, but eliminates \$9,071,141 from the cost thereof? What is
18 Citizens' real agenda? This testimony is relevant to the reasonableness of the
19 alternative recommended by the PER and must not be stricken.
20

21 D. The use of stored water by Citizens was determined relevant by the
22 Commission. In Decision No. 62293, the Commission recognized that any benefits to
23 the aquifer gained by importing CAP water for storage or exchange could be
24 eliminated if it resulted in additional groundwater depletion in the Sun Cities area.
25 *Id.*, p. 20. In the process of reviewing data related to the PER, Mr. Husted found
26

1 Citizens was pumping not only 100% of the CAP water that was being delivered to
2 MWD, but was also pumping all the reclaimed water that it was placing in storage at
3 its USF. Thus, while asking Citizens' ratepayers to expend millions of dollars on a
4 new delivery system to bring CAP water to the golf courses, Citizens and the Rec
5 Centers of Sun City West are using only a fraction of the reclaimed water currently
6 available for that same purpose. If significant golf course pumping could be
7 eliminated without the GSP, the entire GSP is a sham. These facts need to be brought
8 to the attention of and considered by the Commission. They are relevant to the
9 questions of whether the GSP proposed by Citizens is reasonable and whether the
10 GSP is being used to enable Citizens to increase its pumping and thereby support
11 growth. Mr. Hustead has offered a way to ensure such misuse of the benefits of the
12 GSP, if approved, does not occur. The testimony is relevant and should not be
13 stricken.
14

15 E. Mr. Hustead appropriately set forth his overall recommendations in
16 Section XVI. In what can only be characterized as the ultimate misuse of a motion to
17 strike, Citizens suggests that Mr. Hustead not be allowed to set forth his final
18 recommendations for Commission's consideration. This request by Citizens must be
19 summarily rejected.
20

21 **III. TESTIMONY REGARDING IMPACTS ON RATES AND RUCO'S**
22 **POSITION ON THE GSP IS APPROPRIATE.**

23 Based upon unaudited data, both the Commission Staff ("Staff") and
24 RUCO, estimated the ratepayers may see their rates increase approximately 44%
25 (Staff - 44.25%; RUCO - 43.8%). Approximately 50% of this increase (i.e., an
26 increase of approximately 22% representing a cost to ratepayers of over \$2,380,000

1 annually) is directly related to the unnecessary GSP. Citizens and Staff have
2 downplayed the adverse impact of this imprudent project by arguing that this
3 represents less than a Five Dollar (\$5.00) per connection per month increase, if evenly
4 distributed among the 31,000 connections in Sun City. This misses the point.

5 First, *any* cost beyond what is reasonably and prudently incurred is
6 improper and must not be authorized by the Commission. Secondly, this approach
7 masks the ongoing annual expense of over \$2,380,000 being collected each and every
8 year the GSP is in service. Moreover, Staff's calculations emphasizes that the burden
9 falls disproportionately on the ratepayers of Sun City Water Company (\$1,840,642
10 annually versus \$543,721 annually). The Commission, in Finding of Fact No. 24 of
11 Decision No. 62293, specifically found: "While the use of CAP water will support the
12 State's water policy goals, CAP water at any cost is not necessarily a prudent
13 decision." *Id.*, p. 19. These impacts on ratepayers are relevant and must be
14 considered by the Commission.
15

16 **IV. THE COMMISSION HAS ALWAYS ERRED ON THE SIDE OF**
17 **INCLUDING RATHER THAN EXCLUDING EVIDENCE.**

18 The Commission is not bound to follow the rules of evidence. AAC
19 R14-3-109K. The Commission has a history of hearing the evidence and then making
20 its own decision on what is and is not relevant. SCTA has one witness. RUCO has
21 one witness. Both are testifying on different subject matters. In contrast, the parties
22 advocating adoption of the GSP as presented by Citizens (Citizens and Staff) have
23 offered a total of five witnesses. The parties opposing the GSP should not be
24 unnecessarily constrained in presenting their views. Therefore, even if the
25 Administrative Law Judge felt that some of the testimony approached or even
26

1 stretched the limits of her procedural order, the testimony is relevant to the
2 determination the Commission must ultimately make, and in the exercise of her
3 discretion, should not strike the testimony.

4 WHEREFORE, Citizens' Motion to Strike must be denied.

5 Respectfully submitted this 3rd day of August, 2001.

6 MARTINEZ & CURTIS, P.C.

7
8 By: 

9 William P. Sullivan

10 Paul R. Michaud

11 2712 North Seventh Street

12 Phoenix, Arizona 85006-1090

13 Attorneys for Sun City Taxpayers
14 Association

1
2 **An original and ten (10) copies of**
3 **the foregoing are filed this 3rd**
4 **day of August, 2001 with:**

5 Docket Control
6 Arizona Corporation Commission
7 1200 West Washington
8 Phoenix, Arizona 85007

9 **A copy of the foregoing**
10 **mailed or hand-delivered this 3rd**
11 **day of August, 2001 to:**

12 William A. Mundell, Chairman
13 Arizona Corporation Commission
14 1200 West Washington
15 Phoenix, Arizona 85007

16 Jim Irvin, Commissioner
17 Arizona Corporation Commission
18 1200 West Washington
19 Phoenix, Arizona 85007

20 Marc Spitzer, Commissioner
21 Arizona Corporation Commission
22 1200 West Washington
23 Phoenix, Arizona 85007

24 Jane Rodda
25 Acting Chief Administrative Law Judge
26 Arizona Corporation Commission
400 West Congress
Tucson, Arizona 85701-1347

Christopher Kempley, Chief Counsel
Janet Wagner, Staff Counsel
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Scott Wakefield, Esq.
RUCO
2828 North Central Avenue
Suite 1200
Phoenix, Arizona 85004

Barbara R. Goldberg, Esq.
Steptoe & Johnson, LLP
Two Renaissance Square
40 North Central Avenue, 24th Floor
Phoenix, Arizona 85004-4453

Mr. Walter W. Meek, President
Arizona Utility Investors Association
2100 North Central Avenue
Suite 210
Phoenix, Arizona 85004

William G. Beyer, Esq.
5632 W. Alameda Road
Glendale, Arizona 85310
Attorney for Recreation Centers of Sun
City and Recreation Centers of Sun City
West

Mr. Ray Jones
General Manager
Sun City Water Company
Post Office Box 1687
Sun City, Arizona 85372

Michael M. Grant, Esq.
Todd C. Wiley, Esq.
Gallagher & Kennedy, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Attorneys for Citizens Communications
Company


1503/-8/pleadings/response/motion to strike.0802.01